No. 05-646

IN THE SUPREME COURT OF THE UNITED STATES

RALPH MANUEL DAVALOS, Petitioner

v.

STATE OF CALIFORNIA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION SIX

PETITION FOR WRIT OF CERTIORARI

Lyn A. Woodward
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309 Prescott Lane
Pacific Grove, California 93950
(831) 375-1191
Attorney of Record for Petitioner, Ralph Manuel Davalos

QUESTIONS PRESENTED

1. May law enforcement search a passenger during a traffic stop pursuant to the passenger's parole terms absent any individualized suspicion of criminal wrongdoing.

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PETITION

Petitioner Ralph Manuel Davalos respectfully prays that a writ of certiorari issue to review the decision of the California Court of Appeal, Second Appellate District, Division Six, affirming his conviction and the denial of his motion to suppress evidence pursuant to the Fourth Amendment to the United States Constitution.

LIST OF PARTIES

The parties are as they appear in the caption.

OPINION BELOW

The opinion of the California Court of Appeal, Second Appellate District, Division Six, is not published. A copy is attached as Appendix C. The California Supreme Court's order denying review on August 17, 2005 is attached as Appendix A. The order denying petitioner's suppression motion by the Superior Court of the State of California,

County of Ventura, is attached as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1257(a). The California Court of Appeal, Second District, Division Six, filed its opinion on May 31, 2005. The California Supreme Court filed its order denying review on August 17, 2005.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be search, and the persons or things to be seized.

STATE STATUTES INVOLVED

California Penal Code section 1538.5:

(a) (1) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

(A) The search or seizure without a warrant was unreasonable.

(B) The search or seizure with a warrant was unreasonable because any of the following apply:

(i) The warrant is insufficient on its face.

(ii) The property or evidence obtained is not that described in the warrant.

(iii) There was not probable cause for the issuance of the warrant.

(iv) The method of execution of the warrant violated federal or state constitutional standards.

(v) There was any other violation of federal

or state constitutional standards.

STATEMENT OF THE CASE

Petitioner, Ralph Manuel Davalos ("Davalos"), was charged with carrying a dirk or dagger. *Clerk's Transcript* "CT" 2. He was also charged with having a prior serious or violent and felony, and having served a prior prison term. CT 2.

Davalos moved to suppress the evidence against him under *California Penal Code* Section 1538.5, on the grounds that he was searched unreasonably pursuant to parole search terms without any individualized suspicion of wrongdoing. CT 16. His motion was denied. CT 46.

Davalos then pled guilty to carrying a dirk or dagger and admitted sustaining the prior felony and the prior prison term as charged. *Reporter's Transcript* ("RT") 26-29. The trial court exercised its discretion to strike the
prior felony conviction in the interests of justice, and Davalos was placed on parole. CT 83.

HOW THE FEDERAL QUESTION WAS PRESENTED BELOW

Davalos moved the trial court to suppress evidence pursuant to the Fourth Amendment of the Federal Constitution, according to the procedure provided for by state law by state law, set forth in California Penal Code section 1538.5. CT 16.

In ruling on Davalos's motion to suppress, the trial court received evidence from the law enforcement officer who searched him. CT 89-99. When the trial court denied his motion, Davalos pled guilty to carrying a dirk or dagger. RT 26-29.

Davalos appealed his sentence to the California Court of Appeal, Second District, Division Six, claiming the parole search violated the Fourth Amendment to the United States Constitution. The Court of Appeal affirmed the trial court's ruling, and thus Davalos's conviction, on May 31, 2005. Davalos petitioned the California Supreme Court for review, and review was denied in an order filed August 17, 2005.

REASONS FOR GRANTING THE WRIT

The California Supreme Court in *People v. Reyes,* 19 Cal.4th 743 (1998) decided an important question of federal law, upheld by the Court of Appeal, Second District in this case, that should be reviewed by this Court. Specifically, the California Court of Appeal has concluded that the Fourth Amendment to the federal Constitution permits parole searches without any individualized suspicion of criminal wrongdoing. This ruling is not consistent with the requirements of the Fourth Amendment.

The California Supreme Court was provided the opportunity to review petitioner's federal constitutional challenge to *People v. Reyes, supra,* 19 Cal.4th at p. 743 and declined to do so. Appendix A.

Davalos asks this court to review the California Supreme Court's decision in *People v. Reyes* and to resolve the question left open in *United States v. Knights, 534 U.S. 11 (2001)* [whether a parole search for investigatory or probationary purposes performed *absent any individualized suspicion* would satisfy the reasonableness requirement of the Fourth.].)

Petitioner respectfully requests that this Court grant review and consider the issue in this case.

I. THE FOURTH AMENDMENT DOES NOT PERMIT A SUSPICIONLESS PAROLE SEARCH.

As to whether a parole search can be initiated only upon individualized suspicion of criminal wrongdoing, the California Supreme Court has offered an answer in the absence of a ruling from this Court. In *People v. Reyes,* 19 Cal.4th 743 (1998), the majority held that no individualized or particularized suspicion is required before a parole agent searches his parolee's residence for drugs. *People v. Reyes, supra,* 4 Cal.4th at 753. Instead, Fourth Amendment protects parolees only from searches that are "arbitrary and capricious" according to the California Supreme Court's analysis. *Id.* at 753-754. A search that is arbitrary and capricious is motivated by illegitimate purpose, such as personal animosity. *In re Anthony S.,* 4 Cal.App.4th 1000, 1004 (1992), cited with approval in *People v. Reyes, supra,* 4 Cal.4th at 754.

Following the *Reyes* decision came *United States v. Knights (2001) 534 U.S. 112*, in which this Court held that reasonable suspicion, rather than probable cause, was sufficient to support the search of a probationer's home for "investigatory" rather than "probationary" purposes. (*United States v. Knights, supra,* 534 U.S. at p. 120, fn. 6.) This Court declined to decide the broader issue of whether a parole search for investigatory or probationary purposes performed *absent any individualized suspicion* would satisfy the reasonableness requirement of the Fourth Amendment. (*Ibid.*).

As explained by Justice Kennard dissenting in *Reyes, supra,* this Court "has never held that the Fourth Amendment to the federal Constitution permits warrantless, nonconsensual government searches of private residences without at least reasonable suspicion." (*People v. Reyes, supra,* 19 Cal.4th at 759; *see, also, United States v. Giannetta,* 909 F.2d 571, 576 (1st Cir.1990), relying on *Griffin v. Wisconsin,* 483 U.S. 868 (1987) [search must be reasonable where conducted pursuant to signed waiver allowing search "with or without reasonable suspicion"]. Justice Kennard did not further comment on the extent to which Fourth

Amendment protections must extend to searches outside the residence.

Davalos contends that the federal Constitution requires at least some individualized suspicion of criminal wrongdoing before a parole search may be conducted. Reasonable suspicion should be the *minimum* level of Fourth Amendment constitutional protection. (*People v. Reyes, supra,* 19 Cal.4th at 759.) Davalos urges this Court to accept review and reverse the California Supreme Court's decision in *Reyes.*

Here, Deputy Meixner performed a parole search when Davalos, a parolee, was discovered to be riding in a car subject to a traffic stop for expired tags. There was no individualized suspicion that Davalos had committed or was in the process of committing a criminal act or violating parole. Under the circumstances, Davalos was searched for no particular reason whatsoever. He was searched simply because the opportunity arose during a routine traffic stop for a citable traffic violation. Such grounds for search, even if a parolee has waived his Fourth Amendment rights as required by statute, fails to satisfy federal

constitutional scrutiny under Ninth Circuit case law and the United States Supreme Court's decision in *Griffith, supra,* 483 U.S. at p. 873-880.)

Therefore, the parole search violated the Fourth Amendment and the suppression motion should have been granted.

II. CONCLUSION.

Davalos respectfully requests this Court to grant his petition for writ of certiorari, review his case for violation of the Fourth Amendment of the United States Constitution, and reverse the state court's holding.

Dated: November 11, 2005

Respectfully submitted,

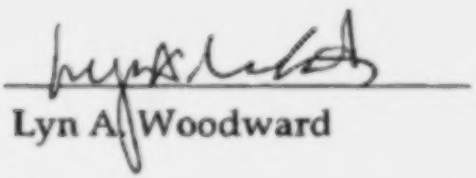
Lyn A. Woodward
Attorney at Law
309 Prescott Lane
Pacific Grove, California 93950
Telephone: (831) 375-1191
Attorney of Record for Petitioner

CERTIFICATE OF COMPLIANCE

This original brief is presented in proportionately-spaced 12.5 point Roman font (Book Antique). The lines are spaced at least 2 points from one another. There are no footnotes. Quotes greater tan 50 words in length are indented. The word count for this brief is 1,524 words, 8,372 characters (without spaces) not including the tables.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 11th day of November 2005 at Pacific Grove, California.



Lyn A. Woodward

Court of Appeal, Second Appellate District,
Division Six – No. B175098

S135479

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent

v.

RALPH DAVALOS, Defendant and Appellant

Petition for Review DENIED.

Werdegar, J., was absent and did not participate.

SUPREME COURT
FILED
AUG 17 2005
Frederick K. Ohlrich Clerk

Deputy

George

Chief Justice

Superior Court of the State of California, County of Ventura

MINUTE ORDER REPORT

Case Number 2003034549 F A People v. Davalos, Ralph Manuel
93 days from first appearance

Name: Davalos, Ralph Manuel Courtroom 45 For 01/22/04 03:00 PM
Case #: 20030000034549 F A Atty Name: Martha Wolter PD

Case Status: Open **Mand. App. Yes**
Release Status: Remanded
Charging Documents: Information Bail Set Amt.: $35,000 Last Date for Trial: 02/04/04

Violations

Cnt	S/A	Off Lvl	Plea Dt	Plea	Disposition Dt	Dispo	Bail Schedule
1	F	12020(a) PC1350(a)		Not Guilty	11/17/03		$20,000.00
		10/18/03 Carrying A Dirk And Dagger					
1	F	667S2 PC		Denied	11/17/03		$10,000.00
		10/18/03 S/A – Prior – Strike 2					
2	F	667.5(b) PC		Denied	11/17/03		$10,000.00
		11/17/99 S/A – Prior – Prior Any Felony					

Fiscal Component	Due	Balance
Fees	$25.00	$25.00
Case total:	$25.00	$25.00

Superior Court of the State of California, County of Ventura

MINUTE ORDER REPORT

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Charging Documents: Information Bail Set Amt.: $35,000 Last Date for Trial: 02/04/04

Docket Dt	Seq	Code	Text
01/22/2004	1	HHELD	Jury trial and 1538.5 Motion heard in Courtroom 14 on Jan. 22 2004 at 01:30PM
	2	OFJUD	Judge Curtis, Hebert III
	3	OFJA	Judicial Assistannt—Balam, Evelyn K.
	4	OFREP	Court Reporter, De La O, Katheryn is present.
	5	PP	The defendant is present in court.
	6	PPD	Public Defender marty Wolter is present.
	7	PPDA	Deputy District Attorney Tom Frye present.
	8	CLASG	Case assigned to Courtroom 45 for 1538.5 Motion to begin 1/22/04 at 3:00 PM.
	9	FCFREE	and possible plea.
	10	BLCURS	Defendant is remanded go the custody of the Sheriff's Office. Bail remains as currently set.

MINUTE ORDER REPORT

Case Number 2003034549 F A People v. Davalos, Ralph Manuel
93 days from first appearance

Name: Davalos, Ralph Manuel Courtroom 45 For 01/22/04 03;00 PM
Case #: 20030000034549 F A Atty Name: Martha Wolter PD

Case Status: Open **Mand. App. Yes**
Release Status: Remanded
Charging Documents: Information Bail Set Amt.: $35,000 Last Date for Trial: 02/04/04

Docket Dt	Seq	Code	Text
	11	BLOTA	The court orders you to appear.
	13	HHELD	1538.5 PC Motion Head in Courtroom 45 on Jan. 22 2004 at 3.00 PM.
	14	OFJUD	Judge McGee, Kevin J.
	15	OFJA	Judicial Assistant— Perez, Angelina G.
	16	OFREP	Court reporter – C[illegible]l, Stephanie R. is present.
	17	PP	The defendant is present in court.
	19	ATLCLK	Certified Law ClrkTiberini is present; supervised bu Tom Frye.
	20	PPD	Pu[illegible] Defender Martha Wolter is present in court.
	21	TRTIM	At 03:28 AM.
	22	FCFREE	Defense counsel request to conference before starting on the 1538.5 motion.
	23	FCFREE	Counsel and court confer in chambers
	24	TRTIM	At 03:35 PM.
	25	MOCM1	The court is in session, all the parties are present, the 1538.5 pC motion commences.

MINUTE ORDER REPORT

Case Number 2003034549 F A People v. Davalos, Ralph Manuel
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Name: Davalos, Ralph Manuel Courtroom 45 For 01/22/04 03;00 PM
Case #: 20030000034549 F A Atty Name: Martha Wolter PD

Case Status: Open **Mand. App. Yes**
Release Status: Remanded
Charging Documents: Information Bail Set Amt.: $35,000 Last Date for Trial: 02/04/04

Docket Dt	Seq	Code	Text
	26	MOB1538	Basis for 1538.5 PC motion is illegal search.
	27	FCSTIP1	The parties stipuklate: no warrants.
	28	TRPEOP	For the People:
	29	TRWIT	People witness Deputy Merixner is sworn and testifes..
	30	TRWID	The witness identified defendant.
	31	TRCROSS	Cross-Examination of the witness commences.
	32	TRDRT	Re-Direct examination of the witness commences.
	33	TRRCROS	Re-Cross exmination of the winess commences.
	34	TRSTIP	Stipulation by all parties re: at the time of the stop defendant was on parole with search terms.
	35	TRREST	People rest.
	36	PTNOE	No defense evidence presented.
	37	TRARGU	Argument by the defense.
	38	TRARGU	Argument by the People
	39	MO1538	1538.5 motion is denied.

MINUTE ORDER REPORT

Case Number 2003034549 F A People v. Davalos, Ralph Manuel
93 days from first appearance

Name: Davalos, Ralph Manuel Courtroom 45 For 01/22/04 03:00 PM
Case #: 20030000034549 F A Atty Name: Martha Wolter PD

Case Status: Open Mand. App. Yes
Release Status: Remanded
Charging Documents: Information Bail Set Amt.: $35,000 Last Date for Trial: 02/04/04

Docket Dt	Seq	Code	Text
	40	CLCONT	**Case continued to 01/26/04 at 8:30 AM in Courtroom 14 for JURY TRIAL.**
	41	BLOTA	The court orders you to appear.
	42	BLCURS	Defendant is remanded to the custody of the Sheriff's Office. Bail remains as previously set.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL

SECOND APPELLATE DISTRICT

DIVISION SIX

E PEOPLE,	2d. Crim. No. B175098
ntiff and Respondent,	Super. Ct. No. 2003034549)
	(Ventura County)
LPH MANUEL DAVALOS,	
endant and Appellant.	

Ralph Manuel Davalos appeals a judgment fter his no contest plea to carrying a dirk or dagger Pen. Code § 12020, subd. (a)), and the denial of his

motion to suppress (Pen. Code § 1538.5). We conclude that the police did not need reasonable suspicion to conduct a parole search of Davalos. We affirm. FACTS

Deputy Sheriff William Meixner stopped a car because it crossed "over the limit line" and had expired registration tags. He approached the passenger side where Davalos was sitting. He recognized Davalos "from prior contacts" and knew he had been on parole. Meixner smelled the "odor of alcohol in the car" and knew Davalos had "alcohol terms as part of his parole." He searched Davalos and found a long knife in the front pocket of his shorts. Davalos moved to suppress the evidence of the knife, claiming the search violated his Fourth Amendment rights.

DISCUSSION

1. Parole Search Without Reasonable Suspicion

Davalos contends that under the Fourth Amendment police officers must have reasonable

suspicion to conduct a parole search. We disagree.

Our Supreme Court has rejected this contention. In *People v. Reyes* (1998) 19 Cal.4th 743, the Court held that "a parole search may be reasonable despite the absence of particularized suspicion." (*Id.* at p. 753.) It said, "Because of society's interest both in assuring the parolee corrects his behavior and in protecting its citizens against dangerous criminals, a search pursuant to a parole condition, without reasonable suspicion, does not `intrude on a reasonable expectation of privacy....' [Citation]" (*Id.* at p. 751.) Such searches, however, may not be oppressive or conducted in an unreasonable manner. (*Id.* at p. 753.)

Davalos contends that *Reyes* is in conflict with *United States v. Knights* (2001) 534 U.S. 112. We disagree. In *Knights*, the United States Supreme Court held that a warrantless search of a probationer's apartment "supported by reasonable suspicion and authorized by a condition of

probation, was reasonable within the meaning of the Fourth Amendment." (*Id.* at p. 122.) *Knights* did not decide whether probation search "without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment." (*Id.* at p. 120, fn. 6.) It noted, "'The terms of the probation condition permit such a search, but we need not address the constitutionality of a suspicionless search because the search in this case was supported by reasonable suspicion.' (*Ibid.*" After *Knights*, the California Supreme Court in *People v. Sanders* (2003) 31 Cal.4th 318, 333, reiterated that parole searches may be conducted "in the absence of a particularized suspicion of criminal activity...."

Davalos contends the Ninth Circuit would reach a different conclusion than the California Supreme Court. But the ninth Circuit en banc recently held that compelling federal parolees to submit DNA profiling in the absence of individualized suspicion does not violate the

Fourth Amendment. (*U.S. v. Kincaid* (9th Cir. 2004) 379 F.3d 813, 816, 835.) It said, parolees....are not entitled to the full panoply of rights and protections possessed by the general public." (*Id.* at p. 833.) They "enjoy severely constricted expectations of privacy...." (*Id.* at 834.) Kincade is consistent with *Reyes*.

But even if the Ninth Circuit disagrees with *Reyes*, the result does not change. "[A]lthough we are bound by decisions of the United States Supreme Court interpreting the federal Constitution [citations], we are not bound by the decisions of the lower federal courts...." (*People v. Bradley* (1969) 1 Cal.3d 80, 86.) We are, however, bound by California Supreme Court decisions. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455.) Davalos has not shown that the search was conducted in an unreasonable manner. There was no error.

The judgment is affirmed.

NOT TO BE PUBLISHED.

Gilbert, P.J.

We concur:

COFFEE, J.

PERREN, J.

No. 05-646

IN THE SUPREME COURT OF THE UNITED STATES

RALPH DAVALOS, *Petitioner*,

v.

STATE OF CALIFORNIA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
MANUEL M. MEDEIROS
State Solicitor General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor General
KRISTOFER JORSTAD
Appellate Advocacy Advisor
JAIME L. FUSTER
Supervising Deputy Attorney General
State Bar No. 137582
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2354
Fax: (213) 897-6496
Counsel for Respondent

QUESTIONS PRESENTED

1. Does the Fourth Amendment permit the suspicionless search of a parolee to determine whether he or she is complying with the conditions of his or her parole?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 05-646

RALPH DAVALOS, *Petitioner*,

v.

STATE OF CALIFORNIA, *Respondent*.

OPINION BELOW

The opinion of the California Court of Appeal was not published in the official reports and is attached to the Petition of Writ of Certiorari ("Petition" or "Pet."). (Pet. App. C.) The order of the California Supreme Court denying review is also unreported. (Pet. App. A.)

STATEMENT OF JURISDICTION

The unpublished decision of the California Court of Appeal issued on May 31, 2005. (Pet. App. C.) The California Supreme Court denied petitioner's petition for review on August 17, 2005. (Pet. App. A.) The Petition was filed in this Court on November 14, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

On July 31, 1997, petitioner was convicted of first degree burglary and served a prison term. (CT at 53.)[1] Pursuant to

1. "CT" refers to the Clerk's Transcript prepared in connection with petitioner's direct appeal to the California Court of Appeal. "RT" refers to the Reporters' Transcript prepared for the same appeal.

California law, Cal. Penal Code § 3067(a), and prior to his release on parole, petitioner agreed in writing to be subject to search or seizure by a parole officer or other peace officer at any time, with or without a search warrant and with or without cause. (RT at 14-15.)

On October 18, 2003, around 11:00 p.m., Ventura County Sheriff's Deputy William Meixner and his partner, Deputy Wiggins, were patrolling Main Street in Piru, when they noticed a vehicle with expired registration tags. The vehicle also failed to make a stop before the limit line at an intersection. (CT at 89-90; RT at 6.) The deputies stopped the vehicle for these violations. During the traffic stop, Deputy Meixner approached the passenger side of the car and recognized petitioner as a parolee from prior contacts. Deputy Meixner asked petitioner if he was still on parole, and petitioner confirmed that he was. The deputy knew that, at the time, petitioner was subject to search as part of his parole terms. Deputy Meixner asked petitioner to get out of the car and walk to the patrol car, where the deputy searched petitioner. (CT at 90; RT at 6-7, 11-12.) In the front left pocket of petitioner's shorts, the deputy found a knife with a five-inch blade. (CT at 91; RT at 8.) Petitioner was cooperative during the encounter. (CT at 97.)

The Ventura County District Attorney charged petitioner with carrying a dirk or dagger in violation of California Penal Code section 12020(a). It was also alleged that petitioner had a prior conviction within the meaning of California's Three Strikes Law, Cal. Penal Code § 1170.12, and had served a prior prison term within the meaning of California Penal Code section 667.5(b). (CT at 2.) Petitioner pled not guilty and denied the special allegations. (CT at 3-4.) The trial court denied petitioner's suppression motion, finding that Deputy Meixner reasonably searched petitioner pursuant to his parole search terms. (CT at 46; RT at 22.) As a result, petitioner withdrew his prior plea and pled guilty to the sole charge. He also admitted his prior conviction and prison term. (CT at 53-69; RT at 28.) Petitioner was placed on formal probation for 36 months. (CT at 83.)

Petitioner appealed the trial court's suppression ruling. (CT at 85.) Following precedent of the California Supreme Court, the California Court of Appeal affirmed the trial court's ruling. The court found that the Fourth Amendment did not bar Deputy Meixner from conducting a suspicionless parole search and that the search was not oppressive or conducted in an unreasonable manner. (Pet. App.

C at 2-5.) The California Supreme Court declined review in this case. (Pet. App. A at 1.)

REASONS WHY THE WRIT SHOULD BE DENIED

I.

CERTIORARI SHOULD BE DENIED BECAUSE THE INSTANT ISSUE IS ALREADY UNDER CONSIDERATION IN ANOTHER CASE

Petitioner asks this Court to grant certiorari in this case to review its holding, in light of the California Supreme Court's decision in *People v. Reyes*, 19 Cal. 4th 743, 968 P.2d 445, 80 Cal. Rptr. 2d 734 (1998), that, as long as the searches are not arbitrary or capricious, the Fourth Amendment permits parole searches without any individualized suspicion of criminal wrongdoing. According to petitioner, the state court's ruling is inconsistent with the requirements of the Fourth Amendment. He maintains that "reasonable suspicion" should be the minimum level of constitutional protection in this context. Petitioner further notes that, in *United States v. Knights*, 534 U.S. 112 (2001), this Court left open the instant question about the propriety of suspicionless parole searches. (Pet. 6-7.)

Respondent notes that, on September 27, 2005, this Court granted certiorari in the case of *Samson v. California*, 04-9728, to review the following question: Does the Fourth Amendment prohibit police from conducting a warrantless search of a person who is subject to a parole search condition, where there is no suspicion of criminal wrongdoing and the sole reason for the search is that the person is on parole?[2] In *Samson*, a police officer contacted the defendant on a public street and later searched him after determining the defendant was on parole. The officer found methamphetamine in the defendant's possession. At the time of the search, the defendant was on parole and subject to a search condition, under which he agreed to be searched by a parole officer or other peace officer at any time, with or without a search warrant and with or without cause. As

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2. Respondent respectfully asks this Court to take judicial notice of its own case file in *Samson v. California*. *See* Fed. R. Evid. 201.

in the instant case, the California Court of Appeal, relying on *Reyes*, rejected the defendant's position that the suspicionless search of a parolee violates the Fourth Amendment and found the search was not arbitrary, capricious, or conducted for the purpose of harassment, in violation of California law.

This case, like *Samson*, presents a Fourth Amendment challenge to suspicionless searches of parolees in California. It is therefore likely that this Court's opinion in *Samson* will govern this case. Also, the opinion of the state appellate court in this case was not published and, consequently, lacks precedential value. *See* Cal. R. Ct. 977(a). Thus, there is no need to grant certiorari here to consider this issue again. This Court, of course, might defer ruling on the Petition until *Samson* is decided. *See, e.g., Keney v. New York*, 388 U.S. 440 (1967).

II.

CERTIORARI SHOULD BE DENIED BECAUSE THERE WAS NO FOURTH AMENDMENT VIOLATION IN THIS CASE

As previously noted, this Court has granted certiorari in *Samson* to decided the very same issue raised in the instant case. In *Samson*, respondent has already filed a brief on the merits setting forth in great detail respondent's position that the Fourth Amendment does not bar suspicionless parole searches. Below, respondent provides a summary of the arguments already presented to this Court in *Samson*. Ultimately, as argued in *Samson* and in this case, the instant parole search was not contrary to the Fourth Amendment, and consequently, petitioner is not entitled to certiorari or any other relief.

A. Under The Totality Of The Circumstances, The California Parole Search Condition Is Reasonable Under The Fourth Amendment

Under this Court's totality-of-the-circumstances jurisprudence, the California parole search condition is reasonable under the Fourth Amendment. In this context, "the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Knights*, 534 U.S. at 118-19. This Court must then "balance the privacy-related and law enforcement-related concerns

to determine if the intrusion was reasonable." *Illinois v. McArthur*, 531 U.S. 326, 331 (2001). A defendant's status as a parolee subject to a search condition "informs both sides of that balance." *Knights*, 534 U.S. at 119.

It is beyond dispute that a parolee has a significantly reduced expectation of privacy. *See Morrissey v. Brewer*, 408 U.S. 471, 478 (1972) (describing the conditions of parole imposed on parolees throughout the nation). It is difficult to conceive of a person other than a prison inmate whose reasonable or actual expectation of privacy is less than that of a parolee. *See Hudson v. Palmer*, 468 U.S. 517 (1984). Indeed, although at liberty, in California "[p]risoners on parole shall remain under the legal custody of the [California Department of Corrections and Rehabilitation]." Cal. Penal Code § 3056. Among other conditions, the parolee's person, his or her residence, and any property under his or her control "may be searched without a warrant at any time by any agent of the Department of Corrections or any law enforcement officer." Cal. Code Regs. Tit. 15, § 2511(b)(4). This search condition is not merely a requirement of the Department of Corrections and Rehabilitation; it is imposed by the People of California, acting through their elected state legislature. *See* Cal. Penal Code § 3067(a).[3] Consequently, it is irrefutable that petitioner, like all parolees who accept this condition, "had no subjective expectation of privacy whatsoever." *United States v. Crawford*, 372 F.3d 1048, 1065 (9th Cir. 2004) (Trott, J., concurring); *see Knights*, 534 U.S. at 119-20. For this reason alone, the deputy's conduct herein was reasonable within the meaning of the Fourth Amendment. *See Smith v. Maryland*, 442 U.S. 735, 742-43 (1979).

Nevertheless, the discretion of the searching officer is not untrammeled. Rather, it is circumscribed by the state law requirement, found in decisional law and statute, that the search not be arbitrary, capricious or conducted for the purpose of harassment. *See Reyes*, 19 Cal. 4th at 753-54, 968 P.2d at 451, 80 Cal. Rptr. 2d at

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3. California Penal Code section 3067(a) provides: "Any inmate who is eligible for release on parole pursuant to this chapter shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of day or night, with or without a search warrant and with or without cause."

740. For example, state law protects a parolee from searches that are needlessly repetitive, made at an unreasonable hour, conducted in a humiliating manner, or under other oppressive circumstances. *People v. Clower*, 16 Cal. App. 4th 1737, 1741, 21 Cal. Rptr. 2d 38 (1993). This circumscription further protects a person with the greatly reduced expectation of privacy possessed by a parolee. In this case, petitioner did not challenge the scope or intensity of the search in state court. And he cannot validly claim that the scope or intensity of the search was unreasonable in relation to the purpose of the search. (*See* Statement of the Case, *ante*.)

In turn, the parole search serves a compelling, if not overwhelming, need. The California Legislature has determined the "supervision and surveillance of parolees" is necessary to promote "the interest of public safety for the state[.]" Cal. Penal Code § 3000(a)(1). This Court has similarly concluded that the state interest in the successful management of the parole system to ensure compliance with parole conditions is "overwhelming." *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 365 (1998). This Court has approved "close parole supervision" because "parolees are more likely to commit future criminal offenses than are average citizens." *Id.* at 365; *see Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987); *see also Ewing v. California*, 538 U.S. 11, 26 (2003) (statistics on recidivism in California); *Crawford*, 372 F.3d at 1069 (statistics on recidivism of California parolees).

Certainly, the California parole search condition serves the state's interest in the supervision of its parolees. This Court has recognized that "if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential." *United States v. Biswell*, 406 U.S. 311, 316 (1972). Of course, under a regime of reasonable suspicion, searches can be only as frequent as the discovery of the requisite quantum of suspicion permits. The requirement of individualized suspicion, as the California Legislature concluded, would frustrate the need for effective supervision of parolees. Careful concealment of illegal activities would allow these activities to go "undetected and uncorrected." *Griffin*, 483 U.S. at 878.

The balance of competing interests—the parolee's greatly diminished expectation of privacy and the State's need to supervise a person who was, and likely remains, a threat to society—justifies California's rule permitting suspicionless searches of parolees'

persons and effects. A requirement of reasonable suspicion urged by petitioner would strike an inappropriate balance of the competing interests.

Nonconsensual street encounters between police and citizens are generally governed by the reasonable suspicion standard announced in *Terry v. Ohio*, 392 U.S. 1 (1968). Thus, reasonable suspicion that a person is about to commit a crime justifies his detention; reasonable suspicion that he or she has a weapon justifies his or her search. Under petitioner's view of the law, a parolee would receive virtually as much protection from the Fourth Amendment as a citizen who was not on parole. The only difference would be the circumstance in which the officer had reasonable suspicion to believe that the person under investigation possessed incriminating evidence other than a weapon. In that situation, the nonparolee could not be searched, *Minnesota v. Dickerson*, 508 U.S. 366 (1993), but the parolee properly could be searched. Such a *de minimis* difference is wholly inadequate to serve the compelling state interest in the supervision of parolees.

As the Court has noted in discussing the compelling state need for effective probation supervision, the goals of rehabilitation and protection of the community (both of which are typically identified as the objectives of probation and parole) "require and justify the exercise of supervision to assure that the [probation or parole] restrictions are in fact observed. Recent research suggests that more intensive supervision can reduce recidivism[.]" *Griffin*, 483 U.S. at 875. By contrast, petitioner's position would result in less, not more, supervision. The prohibition of searches based on an uncorroborated tip is only one example. Thus, the requirement of reasonable suspicion would "completely undermine the purpose of the search condition." *Owens v. Kelley*, 681 F.2d 1362, 1368 (11th Cir. 1982).

This balance of competing interests confirms the wisdom of *Reyes*, 19 Cal. 4th at 753, 968 P.2d at 451, 80 Cal. Rptr. 2d at 740:

> The level of intrusion is de minimis and the expectation of privacy greatly reduced when the subject of the search is on notice that his activities are being routinely and closely monitored. Moreover, the purpose of the search condition is to deter the commission of crimes and to protect the public, and the effectiveness of the deterrent is enhanced by the potential for random searches. We thus conclude a parole search may be reasonable despite the absence of particularized suspicion.

In sum, a parolee's severely diminished expectation of privacy, adequately protected by the state law prohibition against harassing searches, must yield to the overwhelming governmental need to supervise over 130,000 parolees in California. *See United States v. Kincade*, 379 F.3d 813, 835 (9th Cir. 2004) (en banc) (sustaining suspicionless searches of conditional releasees and their property, as long as "such searches meet the Fourth Amendment touchstone of reasonableness as gauged by the totality of the circumstances").

B. The California Parole Search Condition Is Justified By This Court's "Special Needs" Jurisprudence

This Court's jurisprudence has validated the supervision of probationers and parolees as a "special need" that can justify a suspicionless search. For example, in *Griffin*, this Court held that a state's operation of a probation system "presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements." 483 U.S. at 873-74. Although *Griffin* involved probation, its reasoning and concerns apply "with equal, if not greater, force, to the parole system." *People v. McCullough*, 6 P.3d 774, 779 n.10 (Colo. 2000); *see also Kincade*, 379 F.3d at 825. Because parolees "are more likely to commit future criminal offenses than are average citizens," *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. at 365, this Court recognizes that a state can "accord[] a limited degree of freedom in return for the parolee's assurance that he will comply with the often strict terms and conditions of his release. In most cases, the State is willing to extend parole only because it is able to condition it upon compliance with certain requirements. The State thus has an 'overwhelming interest' in ensuring that a parolee complies with those requirements and is returned to prison if he fails to do so." *Id.* Given that "parole may be an even more severe restriction on liberty because the parolee has already been adjudged in need of incarceration[,] . . . the 'special needs' of probation discussed in *Griffin* would appear to be heightened for parole." *McCullough*, 6 P.3d at 779 n.10; *see also Kincade*, 379 F.3d at 833-35; *Crawford*, 372 F.3d at 1077 (Trott, J., concurring).

That evidence obtained during a parole search may be used in a criminal prosecution does not defeat respondent's position. Under the relevant test, the "special needs" doctrine could not justify a "program whose primary purpose was to detect evidence of ordinary

criminal wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. 32, 38 (2000). In California, although a parole search may serve a law enforcement purpose, the programmatic objective is to supervise parolees by uncovering evidence that reveals whether the parolee is complying with, or violating, the conditions of parole. Not all such evidence constitutes proof of criminal activity. In fact, any evidence may be used for the purpose of an administrative revocation of parole. *See People v. Willis*, 28 Cal. 4th 22, 39, 46 P.3d 898, 909, 120 Cal. Rptr. 2d 105, 118 (2002). Therefore, California's parole search condition falls squarely within the parameters of this Court's "special needs" search jurisprudence. *Griffin*, 483 U.S. at 873-74.

Moreover, the authorization of police officers to conduct parole searches does not alter the "special needs" nature of the search. *See New York v. Burger*, 482 U.S. 691, 717-18 (1987). California invests parole officers and "other peace officer[s]" with the authority to conduct parole searches. Cal. Penal Code § 3067(a). This empowerment rationally serves the California parolee supervision program. Indeed, it is doubtful the program could function without the participation of police officers. As stated earlier, more than 130,000 parolees—equivalent to the population of a city—are on release in California at any given time. It is unrealistic to expect parole officers to surveil the streets twenty-four hours a day in search of parolees who may violate the conditions of their paroles. Given the number and potential mobility of parolees, the statute wisely deploys all available personnel in the supervision of those parolees.

That this necessary use of law enforcement officers is permissible under the Fourth Amendment is illustrated by *Griffin*, 483 U.S. 868. In *Griffin*, police initiated contact with the probation office, encouraged the probation officers to conduct the search, were present during the search, processed the evidence and used it in the probationer's criminal prosecution. This active participation did not invalidate the application of the "special needs" doctrine for reasons equally applicable to this case: the reduced expectation of privacy of parolees and the overwhelming need to supervise their activities closely.

In sum, the search of a parolee by a parole agent or any law enforcement officer to supervise that parolee is a "special needs" search within the meaning of this Court's Fourth Amendment jurisprudence. In turn, to determine the reasonableness of the search, this Court must consider the nature of the privacy interest affected by

the search, the character of the intrusion, the nature and immediacy of the State's concerns, and the efficacy of the means for meeting them. *See Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 830-38 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654-65 (1995). As previously explained in Section A of Argument II, *ante*, a parolee has a significantly diminished expectation of privacy, especially when the parolee has been expressly informed that he or she may be searched by a parole agent or a law enforcement officer at any time with or without cause. In contrast, the state has an overwhelming need to supervise parolees, and a suspicionless search condition is more efficacious than one requiring reasonable suspicion. Consequently, a suspicionless parole search in a public place does not violate the Fourth Amendment.

C. Petitioner Validly Consented To The Parole Search Condition

The issue of consent is properly before this Court. This Court may consider "the questions set out in the petition, or fairly included therein[.]" Sup. Ct. R. 14.1(a). Petitioner has challenged the constitutionality of a California's parole search condition, which permits suspicionless searches. The suspicionless search of a citizen, even a nonparolee, is valid if conducted pursuant to that person's consent. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Consequently, this Court may determine whether petitioner consented and, if so, whether that consent validated the search.

Although the Fourth Amendment generally requires that a search be authorized by a judicial warrant based upon probable cause, it is "well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth*, 412 U.S. at 219; *accord Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990); *Washington v. Chrisman*, 455 U.S. 1, 9-10 (1982). That principle is consistent with the general rule, articulated "in the context of a broad array of constitutional and statutory provisions," that "presumes the availability of waiver." *New York v. Hill*, 528 U.S. 110, 114 (2000) (internal quotation marks omitted); *see also United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) ("A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution"); *Peretz v. United States*, 501 U.S. 923, 936 (1991) ("The most basic rights of criminal

defendants are . . . subject to waiver"). Consent must be voluntary to be constitutionally valid, *Schneckloth*, 412 U.S. at 222; *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968), but an individual's consent to search may be deemed voluntary, for Fourth Amendment purposes, even if it is motivated by the subject's belief that refusal to consent will result in concrete disadvantages. For example, a consent search cannot be found involuntary simply because an individual consents out of a desire to avoid a greater intrusion. *See Schneckloth*, 412 U.S. at 228.

This Court's decision in *Zap v. United States*, 328 U.S. 624 (1946), reflects the view that an individual's consent to search may be deemed voluntary even when that consent is a required condition for receipt of a valuable government benefit. The petitioner in *Zap* "entered into contracts with the Navy Department under which he was to do experimental work on airplane wings and to conduct test flights." *Id.* at 626. Pursuant to statutory requirement, *id.*, the contract between the parties stated that "[t]he accounts and records of the contractor shall be open at all times to the Government and its representatives, and such statements and returns relative to costs shall be made as may be directed by the Government." *Id.* at 627. Government agents subsequently inspected petitioner's business books and records over his objection. *Id.* This Court held that the search was lawful, explaining that "when petitioner, in order to obtain the Government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts." *Id.* at 628.

Zap further establishes the proposition—central to this case—that a consent to search may be granted in advance, and without specific restrictions. The defendant in *Zap* did not give consent at the time the search was conducted; to the contrary, he attempted (unsuccessfully) to prevent the search from occurring. 328 U.S. at 627. The Court nevertheless found that the defendant was bound by his prior contractual commitment to permit inspection of his books and records. *Zap* makes clear that an individual may give valid and binding prospective consent to a category of searches to be performed at unspecified times in the future.[4]

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4. The judgment in *Zap* was subsequently vacated on other

Under California law, a parolee can reject parole by refusing to agree to the search condition. *See* Cal. Penal Code § 3067(b); *see also* Cal. Penal Code § 3060.5; *Willis*, 28 Cal. 4th at 39, 46 P.3d at 908-09, 120 Cal. Rptr. 2d at 118. If the inmate has been granted parole, he or she has necessarily agreed to the condition; if he has not accepted the condition, he is not a parolee. In 2000, when petitioner complied with section 3067(a) and was granted parole, he had a choice. He could have refused to comply with that provision, in which event he would not have been released. Petitioner's acceptance of the search condition constitutes consent within the meaning of this Court's consent jurisprudence.

Petitioner's consent to search given as a condition of release is not rendered involuntary by the fact that the alternative is continued incarceration. First, it is well known that criminal defendants can and often do enter pleas of guilty (with or without plea agreements) that they know will result in substantial periods of incarceration, generally because they regard their alternatives as even more unattractive. This Court has repeatedly recognized that a guilty plea is not rendered involuntary simply because it is motivated by a desire to avoid greater punishment. *See Corbitt v. New Jersey*, 439 U.S. 212, 218-23 (1978); *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *Brady v. United States*, 397 U.S. 742, 755 (1970). Second, the government cannot be said to coerce an individual simply by presenting him with a choice in which one of the alternatives is plainly more attractive than the other. No one would suggest, for example, that a defendant's guilty plea is involuntary if the government offers him a particularly favorable plea agreement. In short, no legal principle supports the view that an individual's waiver of constitutional rights is rendered unenforceable whenever the benefits of that waiver substantially outweigh its costs.

California parolees in general, and petitioner in particular, are given a meaningful choice: conditional liberty with reduced Fourth

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grounds. *See Zap v. United States*, 330 U.S. 800 (1947). This Court has continued to treat *Zap* as good law, however, and has cited it as authority for the proposition that a search based on consent is lawful notwithstanding the absence of a judicial warrant and/or probable cause. *See Schneckloth*, 412 U.S. at 219; *Katz v. United States*, 389 U.S. 347, 358 n.22 (1967); *Texas v. Brown*, 460 U.S. 730, 736 (1983) (plurality opinion).

Amendment protection or continued incarceration with no expectation of privacy. *Hudson*, 468 U.S. 517. "Nothing is more common than an individual's consenting to a search that would otherwise violate the Fourth Amendment, thinking that he will be better off than he would be standing on his rights." *United States v. Barnett*, 415 F.3d 690, 692 (7th Cir. 2005). Confronted with the alternative of continued incarceration, petitioner "gave up nothing." *Id.*

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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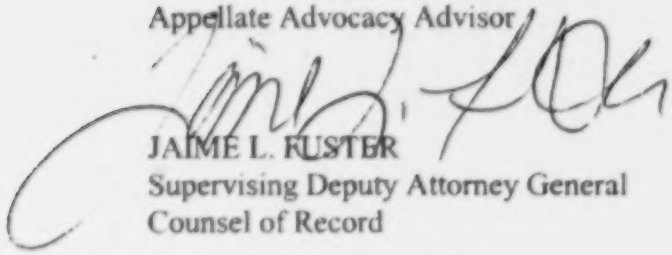

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